

APPEAL NO. 021226  
FILED JUNE 12, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on April 26, 2002. The hearing officer resolved the disputed issues by deciding that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the second, third, fourth, and fifth quarters. The claimant appealed and the respondent (carrier) responded.

DECISION

The hearing officer's decision is affirmed.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). The SIBs criterion in dispute is whether, during the qualifying periods for the second, third, fourth, and fifth quarters, the claimant made a good faith effort to obtain employment commensurate with his ability to work. The claimant contended that he had no ability to work during the relevant qualifying periods. It is undisputed that the claimant did not work or look for work during the relevant qualifying periods. Rule 130.102(d)(4) provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work. Rule 130.102(e) provides in part that, except as provided in subsection (d)(1), (2), (3), and (4) of Rule 130.102, an injured employee who has not returned to work and is able to return to work in any capacity shall look for employment commensurate with his or her ability to work every week of the qualifying period and document his or her job search efforts.

The treating doctor's reports relied upon by the claimant mainly address the claimant's inability to return to his previous employment and to full-duty work, and do not specifically explain how the injury causes a total inability to work. In addition, the claimant underwent a functional capacity evaluation (FCE) toward the end of the qualifying period for the fifth quarter and, according to the report of that evaluation, which is signed by a doctor, the claimant qualifies for the medium-work category. A doctor who examined the claimant at the carrier's request toward the end of the qualifying period for the fifth quarter, and who requested the FCE, reported that the claimant has the ability to perform in the light-work category. Although the last two reports came toward the end of the qualifying period for the fifth quarter, the hearing officer could consider them in determining the claimant's eligibility for SIBs. The Appeals Panel has stated that while it is desirable to have the medical reports be as close to the qualifying periods as possible, medical reports outside the qualifying period at issue can be considered. Texas Workers' Compensation Commission Appeal No.

000096, decided February 29, 2000. The hearing officer found that during the relevant qualifying periods the claimant failed to make a good faith effort to obtain employment commensurate with his ability to work and concluded that the claimant is not entitled to SIBs for the second, third, fourth, and fifth quarters. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. We conclude that the hearing officer's decision is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **LIBERTY MUTUAL FIRE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEMS  
350 NORTH ST. PAUL STREET, SUITE 2900  
DALLAS, TEXAS 75201.**

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Robert W. Potts  
Appeals Judge

CONCUR:

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Elaine M. Chaney  
Appeals Judge

## CONCURRING OPINION:

While I do not believe the decision is against the great weight and preponderance of the evidence, I cannot agree that the hearing officer has the unrestricted ability to take a functional capacity evaluation (FCE) rendered in the fifth quarter and apply it backwards to the second or even third quarter. Clearly, a person's condition can improve over time and it is manifestly unjust to simply assume that what is true in the fifth quarter was necessarily true at a remote and earlier point. The case is affirmable on a lack of narrative, even if I do not agree that the FCE constituted another record showing an ability to work for the earlier quarters.

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Susan M. Kelley  
Appeals Judge